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No. 00-653

In the Supreme Court of the United States

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.,

Petitioners,

v.

WISCONSIN BELL, INC. D/B/A AMERITECH WISCONSIN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR WISCONSIN BELL, INC. d/b/a AMERITECH WISCONSIN IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state commission's acceptance of Congress's invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

2. Whether Congress's decision to permit state public utility commissions to perform certain voluntary federal regulatory functions under a federal statutory scheme, subject to review in federal court, is permissible under the Tenth Amendment.

3. Whether state commission determinations relating to the enforcement of previously-approved section 252 interconnection agreements are reviewable in federal court under 47 U.S.C. § 252(e)(6).

4. Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

RULE 29.6 STATEMENT

Respondent Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin ("Ameritech") is a wholly owned subsidiary of Ameritech Corporation, which is in turn a wholly owned subsidiary of SBC Communications, Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications, Inc.

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BRIEF FOR WISCONSIN BELL, INC. d/b/a AMERITECH WISCONSIN IN OPPOSITION

STATEMENT

A. The Telecommunications Act of 1996. These cases arise under the federal Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) ("the 1996 Act" or "the Act"). As this Court recognized last year, the 1996 Act establishes a "new federal regime" that "fundamentally restructures local telephone markets" and thus "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 378 n.6, 397 (1999). Under this new regime, Congress vested the Federal Communications Commission ("FCC") with broad authority to make general rules and regulations for implementing the new federal substantive standards created by the Act. *Id.* at 377-78 & n.5; see also 47 U.S.C. § 201(b). As Justice Scalia's opinion for the Court explained, "[w]ith regard to the matters addressed by the 1996 Act," the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *Id.* at 378 n.6. At the same time, Congress established a new, voluntary role for state regulators to help administer the Act. If the state regulators choose to discharge their delegated responsibilities under the Act, their actions are reviewable in federal court. 47 U.S.C. § 252(e)(6) & (4). If the state regulators decline the regulatory role offered to them by Congress, the FCC must assume that role. 47 U.S.C. § 252(e)(5).

B. Interconnection Agreements and Statements of Generally Accepted Terms The "key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252." *Pacific Bell* v. *Cook Telecom, Inc.*, 197 F.3d 1236, 1237 (9th Cir. 1999). Most significantly, sections 251 and 252 of the Act govern the

formation and content of "interconnection agreements," which are the federally-mandated means of implementing the local competition provisions of the Act. Notwithstanding their nomenclature, interconnection "agreements" are nothing like private commercial contracts. If private parties are unable to reach agreement after arms-length negotiations, they simply can walk away from the bargaining table. Under the Act, however, Congress has (i) compelled incumbent local exchange carriers ("LECs") to enter into "agreements" that permit competitors to obtain access to incumbent LEC networks at cost-based rates, and (ii) subjected incumbent LECs to "a host of duties intended to facilitate market entry" by competing LECs. *AT&T Corp.*, 525 U.S. at 371.

Upon receiving a request for interconnection from a competing LEC, an incumbent LEC, like Ameritech, "may negotiate and enter into a binding agreement" with the requesting carrier. 47 U.S.C. § 252(a)(1). If, however, the incumbent LEC does not agree to include in its interconnection agreement what a competing carrier believes to be statutory or regulatory requirements, that carrier has a right to ask a state commission (or the FCC, if the state commission fails to act) to compel the incumbent to include those purported requirements in a so-called "agreement." An incumbent LEC may not escape the obligation to enter into section 252 agreements, even if such agreements would be illegal under state law. Moreover, under section 252(i) of the Act, the terms and conditions that are incorporated into a particular agreement must be made available to any other carrier that requests them. 47 U.S.C. § 252(i). In short, the Act sets forth a detailed substantive and procedural framework for imposing a web of *federal* statutory and regulatory obligations on incumbent LECs, and section 252 interconnection "agreements" are the regulatory vehicles for implementing this Congressional compulsion.

The section 252 process essentially involves four steps: (i) negotiation, (ii) arbitration, (iii) approval (or rejection), and (iv) judicial review. At every stage of the process, federal law sets the pertinent standards. To begin the process, a competing LEC asks to negotiate an interconnection agreement with the incumbent LEC. 47 U.S.C. § 252(a)(1). The parties may reach an agreement through negotiations alone. *Id.* Alternatively, either party may file a petition with the state utility commission for arbitration of "any open issues" regarding the interconnection agreement. 47 U.S.C. § 252(b)(1). In conducting section 252 arbitrations, the state regulators are authorized to "impos[e] appropriate conditions as required to implement [section 252(c)]," provided that any conditions they impose comply with section 251 and the FCC's rules implementing it. 47 U.S.C. §§ 252(b)(4)(C) and 252(c)(1); see also *AT&T Corp.*, 525 U.S. at 373 (noting that section 252 arbitrations are "subject to § 251 and the FCC regulations promulgated thereunder"). Although a state commission may impose the requirements of the Act upon an incumbent when the parties do not agree what those requirements are (47 U.S.C. § 252(b)), the commission has no authority to alter the obligations prescribed by a previously-approved "binding" agreement, *id.* § 252(a)(1).

Once the parties reach an agreement, whether through arbitration or negotiation, they must submit the agreement to the state commission for approval. 47 U.S.C. § 252(e)(1). The state commission then must determine whether to approve or reject the agreement, applying the standards set forth in the Act. 47 U.S.C. § 252(e)(2). And any post-approval "dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" also lies within "the states' 'responsibility' under section 252" of the Act. *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission*

Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-52, FCC No. 00-216, ¶ 6 (rel. June 14, 2000) ("*Starpower*").

When the incumbent LEC is a Bell Operating Company, as Ameritech is here, it may file a "statement of generally available terms" ("SGAT"), which is a statement of the terms that it will make available to all competing carriers in a state. 47 U.S.C. § 252(f)(1). As with an interconnection agreement, such a statement must be submitted to the state commission for approval. 47 U.S.C. § 252(f)(2).

C. Judicial Review and FCC Preemption of State Commission Inaction. Although the Act does not require state regulators to participate in the new federal scheme for the regulation of private telecommunications carriers, those state regulators who choose to participate are not simply "allowed to do their own thing" (*AT&T Corp.*, 525 U.S. at 378 n.6); rather, they "must hew" to the lines drawn by the Act, the federal courts, and the FCC. *Id.* The mechanism for ensuring that state regulators do so is 47 U.S.C. § 252(e)(6). After the state regulators make a determination with respect to the rights and obligations of the parties, section 252(e)(6) authorizes "any party aggrieved" by that "determination" to bring an action in "Federal district court" to determine whether the state regulators have met "the requirements of" sections 251 and 252.

Because Congress may not commandeer state commission participation in the Act's federal regulatory scheme, the Act provides a parallel regulatory scheme pursuant to which the Federal Communications Commission ("FCC") performs the prescribed regulatory tasks in the place of non-participating state regulators. If state regulators choose not to accept their "role" as "deputized federal regulator[s]" (Pet. App. 38a), the Act mandates that the FCC "shall issue an order preempting the

State commission's jurisdiction" of the proceeding in question, and "shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5). The FCC's obligation to stand in the shoes of non-participating state regulators extends to every regulatory task under section 252, including the interpretation and enforcement of disputed terms of an agreement. *Starpower*, ¶¶ 6-9 (concluding that state commission failed to perform its authorized section 252 function and preempting state commission jurisdiction over a dispute regarding the proper interpretation of the terms of a section 252 agreement). And like state commission "determinations under section 252," FCC determinations are subject to exclusive federal judicial review (47 U.S.C. § 252(e)(6)) in the federal courts of appeals under the Hobbs Act (47 U.S.C. § 402(a); 28 U.S.C. § 2342).

Federal judicial review of determinations relating to section 252 agreements, whether those determinations are made by a state commission or by the FCC, obviously is a crucial feature of the post-Act regime. As this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves national uniformity in the implementation of federal telecommunications law through section 252 agreements, notwithstanding the involvement of state regulators in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6.

D. The Proceedings Below. As petitioners note (at 2), the four state commission proceedings that form the basis for this appeal involve three types of state commission action. In two of the cases, petitioners made section 252 determinations in

arbitrating and approving a single interconnection agreement between Ameritech and MCI. Both parties to the agreement sought review of petitioners' determinations in that proceeding by filing an action in federal district court pursuant to section 252(e)(6) of the Act. The district court consolidated those two suits, and the United States intervened. The third district court case involved a challenge by Ameritech to petitioners' determinations in interpreting and enforcing two previously-approved interconnection agreements between Ameritech and TCG and between Ameritech and Time Warner. The fourth district court case concerned a challenge to petitioners' determinations regarding Ameritech's statement of generally available terms and conditions.

In each of the four cases, petitioners filed motions to dismiss under the Eleventh Amendment. The district court granted petitioners' motions in a single opinion disposing of all four cases. The court first concluded that petitioners had not waived the state's Eleventh Amendment immunity through their participation in the new federal regulatory scheme under the Act. Pet. App. 82a, 85a-88a; see also *id.* at 59a-67a. The court also ruled that the individual commissioners of the PSCW could not be sued in their individual capacities under the *Ex parte Young* doctrine. *Id.* at 82a-85a; see also *id.* at 68a-73a. In view of its conclusions on waiver and *Ex parte Young*, the court dismissed all of the petitioners — both the state commission and its invididual commissioners. *Id.* at 94a.

The Seventh Circuit reversed, holding that "the Eleventh Amendment does not bar these suits against the state commissions and their commissioners" for two "independent" reasons. Pet. App. 6a.[1] First, the court held that "in the

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[1] The Seventh Circuit consolidated the appeal from the district court's decision on the four Wisconsin cases at issue here with a related matter in which the Illinois Commerce Commission and its

particular circumstances present in these cases, the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act." *Id.* Second, the court held that "the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine." *Id.* In reaching its conclusion on waiver, the Seventh Circuit expressly relied (Pet. App. 28a-40a) on this Court's decisions in *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987). The court also noted its agreement (Pet. App. 35a-37a & n.8) with the Tenth Circuit's waiver analysis and holding in *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929 (10th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593). With respect to the applicability of *Ex parte Young*, the Seventh Circuit "agree[d] with the Sixth and Tenth Circuits that these suits are 'straightforward' *Ex parte Young* cases" (Pet. App. 41a), and squarely rejected (*id.* at 42a-47a) petitioners' contentions that this Court's decisions in *Seminole Tribe* and *Coeur d'Alene Tribe* required a contrary result.

Commissioners brought an interlocutory appeal from of an Illinois district court decision in which the court rejected an Eleventh Amendment defense. The Illinois Commission and Commissioners also have filed a petition for a writ of certiorari, No. 00-744, in which they seek review of the Seventh Circuit decision below.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION AND THE DECISIONS OF THIS COURT OR ANY COURT OF APPEALS.

A. Petitioners first contend that the Seventh Circuit's holding that the Wisconsin commission's participation in the federal regulatory scheme set forth in the Act constitutes a waiver of Eleventh Amendment immunity conflicts with this Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). This contention misreads both *College Savings* and the Act.

In *College Savings*, this Court reaffirmed the long established principle that a state may waive its Eleventh Amendment immunity by consenting to suit. 527 U.S. at 675-76. *College Savings* also confirmed that a state can manifest its consent to suit by accepting the benefits of a federal program that Congress has clearly conditioned on waiver of Eleventh Amendment immunity, provided that (i) the benefit could only be given by Congress, (ii) Congress is free to grant or withhold it, and (iii) the state is free to accept or reject it. *Id.* at 676, 678 n.2, 686-87; see also *Alden* v. *Maine*, 527 U.S. 706, 755 (1999) (noting that Congress does not "lack the authority or means to seek the States' voluntary consent to private suits"). At the same time, the Court made clear that a state does not waive its Eleventh Amendment immunity by simply engaging in "otherwise permissible activity" that happens to be subject to federal regulation. *College Savings*, 527 U.S. at 687.

This Court illustrated through reference to its prior decisions the critical distinction between an invitation to waive immunity on the basis of a state's voluntary acceptance of a federal gratuity (which is permissible) and compulsion to waive immunity as a "sanction" for a state's participation in

"otherwise permissible activity" (which is unconstitutional). The Court first discussed (and overruled) its decision in *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964), which had held that a state waives its Eleventh Amendment immunity simply by engaging in commercial activity that is subject to federal regulation. That decision, the Court concluded, was no longer tenable in light of *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), in which the Court held that Congress could not use its Article I powers to abrogate unilaterally a state's Eleventh Amendment immunity. Because "a congressional power to exact constructive waivers of sovereign immunity * * * would * * *, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*," the Court overruled *Parden*. *College Savings*, 527 U.S. at 683. And because the statute at issue in *College Savings* subjected the states to suits for damages in federal court under the Lanham Act on the basis of the state's marketing of investment products — an "otherwise permissible activity" — the Court held that the state had not voluntarily waived its Eleventh Amendment immunity. *Id.* at 687, 691. In sum, *College Savings* held that Congress cannot make consent to suit a precondition for a state to engage in "otherwise permissible activity," because exclusion of a state from such activity is a "sanction" that "coerces" a state into consenting to suit.

At the same time, however, this Court in *College Savings* reaffirmed its holdings in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987), which together establish that Congress is free to condition a grant of money or authority that a state would not otherwise possess on the state's consent to suit in federal court. As the Court explained, conditions attached to a grant of federal authority (as in *Petty*) or federal funds (as in *Dole*) "are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity."

College Savings, 527 U.S. at 678 n.2. For example, the condition attached by Congress as the price for its approval of the interstate compact at issue in *Petty* gave rise to a valid waiver upon acceptance of the condition by the state because "States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *Id.* at 686. See also *Innes* v. *Kansas State Univ.*, 184 F.3d 1275, 1281, 1284 (10th Cir. 1999) (holding in post-*College Savings* case that state "knowingly and voluntarily waived its Eleventh Amendment immunity" because state agency "consent[ed] to participate in a federal program and to follow the conditions thereof, including participation in certain federal bankruptcy functions, [which] is closely analogous to the waiver found in a state's acceptance of conditioned federal funds"), cert. denied, 120 S. Ct. 1530 (2000).

B. The fundamental error in petitioners' waiver argument is their failure to recognize that the waiver solicited by Congress under the Act falls plainly on the *Petty* and *Dole* side of the line, not on the *Parden* and *College Savings* side.

Notably, petitioners do not question the broad scope of Congress' authority, under the Commerce Clause, to enact legislation regulating local telephone competition. Nor could they. See *FERC* v. *Mississippi*, 456 U.S. 742, 764 (1982) ("the commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities"). In the present context, Congress has exercised its authority under the Commerce Clause to enact a comprehensive federal legislative scheme governing certain aspects of local telecommunication competition. The states "unquestionably" have been preempted in those areas (*AT&T Corp.*, 525 U.S. at 378 n.6), and therefore they have no right to participate in the regulation of those areas under the new federal scheme. Congress, in its sole discretion,

could have decided that the federal statutory scheme would be implemented exclusively by federal regulators.

Accordingly, administration of the 1996 Act's local competition provisions — including those relating to the arbitration, approval or rejection, and enforcement of interconnection agreements and to the approval or rejection of statements of generally available terms — is not an "otherwise permissible activity" in which a state may engage without Congress's permission. Rather, it is a wholly new activity, the terms and conditions of which were established by Congress to impose new obligations on incumbent LECs that are intended to foster a pro-competitive, de-regulatory national policy. It is solely within Congress's purview to determine whether and to what extent state regulators should be involved in the administration of the Act's federal regulatory program. As with the formation of an interstate compact, participating in the administration of a federal regulatory program as a deputized federal regulator is something that states cannot do "without first obtaining the express consent of Congress," and therefore "the granting of such consent is a gratuity." *College Savings*, 527 U.S. at 686.

Here, of course, Congress has chosen to offer the states a role in the administration of the "new federal regime." *AT&T Corp.*, 525 U.S. at 378 n.6. Among other things, states are invited, through their public utility commissions, to participate in the arbitration, approval, and enforcement of interconnection agreements between incumbent and competing LECs. Congress also made clear that if a state chooses to accept the invitation to serve as deputy federal regulators, it must consent to review of its actions in federal court. 47 U.S.C. §§ 252(e)(4) & (6). The imposition of this condition makes eminent sense, for as this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves

national uniformity in the implementation of the 1996 Act, notwithstanding the involvement of state regulators in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6. And, finally, the Act does not compel a state commission to implement the Act's provisions. The states clearly retain the right to decline Congress's invitation. 47 U.S.C. § 252(e)(5). If a state does decline Congress's invitation, the Act merely provides that the FCC will step into the shoes of the non-participating state regulators, applying the same federal standards, again subject to federal judicial review. *Id.*

The 1996 Act presents states and their officials with the same sort of choice that this Court approved in *Petty* and *Dole* and again endorsed in *College Savings*. The opportunity to participate *as a regulator* in the implementation of a federal statute — an activity that did not preexist the 1996 Act and that Congress could have reserved exclusively to the federal government — is a far cry from engaging *as a regulated entity* in an "otherwise permissible activity." When a state operates a savings plan or runs a railroad, that activity ordinarily does not implicate unique federal interests. By contrast, when a state voluntarily acts as a deputized federal regulator, Congress has a special interest in ensuring that the state officials' actions conform to uniform federal standards. That is precisely what Congress intended to accomplish through its conditional invitation to the states under the Act, and any state that accepts Congress's invitation cannot escape the consequences of its voluntary action.[2]

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[2] Petitioners' do not (and cannot) cite a single case in which a court has held that the Act does not make sufficiently clear that the

C. As demonstrated above, the Seventh Circuit's decision does not conflict in any way with this Court's decision in *College Savings*. Indeed, as the Seventh Circuit carefully explained, its decision follows inexorably from this Court's reaffirmation of *Petty* and *Dole*. Moreover, the only other court of appeals to have decided whether the waiver of Eleventh Amendment immunity solicited under the Act is valid under *College Savings* has reached precisely the same conclusion, on the same grounds, as the Seventh Circuit. In *MCI Telecomms. Corp.* v. *Public Service Comm'n*, 216 F.3d 929, 938 (10th Cir. 2000), the Tenth Circuit framed the question as follows: "Utah has voluntarily waived its immunity only if Congress, through the 1996 Act, threatened it with the denial of a gratuity, rather than the imposition of a sanction." In answering that question, the court first observed that although "Congress could have preempted all state regulation of local phone service," through the Act Congress only "preempted state regulatory authority over some aspects of local phone service." *Id.* (citing *AT&T Corp.*, 525 U.S. at 378 n.6). The court then explained that "with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity." *Id.* The court further noted that "[a]s in *Petty* and *Dole*, Congress

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consequence of accepting Congress' invitation to perform federal regulatory functions is consent to suit in federal court. Indeed, even the district court below, which ultimately (and erroneously) held that the Eleventh Amendment barred respondents' suits, concluded that the Act "provides clear notice to the states that their commissions will have to defend their rulings in federal court." Pet. App. 61a; see also *id.* at 89a (reaffirming that the Act "provides a clear warning" to state regulators). Every other court that has addressed the issue of which we are aware has reached the same conclusion. See, *e.g.*, *MCI Telecomms.*, 216 F.3d at 938 ("Congress has clearly expressed its intention that if a state elects to approve or reject an interconnection agreement, then it waives its sovereign immunity").

was under no obligation to allow states to participate in the Act's regulatory scheme." *Id.* On the basis of this analysis, which parallels the Seventh Circuit's analysis in every material respect, the court concluded that "by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity." *Id.*

Petitioners (at 17-18) strain to manufacture a circuit split on the basis of *GTE North* v. *Strand*, 209 F.3d 909 (6th Cir.), cert. denied, 121 S. Ct. 380 (2000), but the Sixth Circuit's brief discussion of waiver, in a footnote (see *id.* at 922 n.6), was plainly dicta. The parties neither briefed nor argued a waiver theory in *GTE North*, because the district court's jurisdiction over the preemption claim in that case was not based on the 1996 Act, but rather on 28 U.S.C. § 1331. *GTE North*, 209 F.3d at 912.

Petitioners' suggestion (at 18) that the Second Circuit's decision in *Burnette* v. *Carothers*, 192 F.3d 52 (2d Cir. 1999), cert. denied, 69 U.S.L.W. 3296 (U.S. Dec. 11, 2000) (No. 00-610), creates a conflict in the circuits is even more far fetched. In *Burnette*, the appellants expressly relied on *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964), in contending that "Connecticut consented to suit in federal court under CERCLA by engaging in an activity regulated by Congress, namely the operation of a prison from which toxic chemicals were released." 192 F.3d at 60. As the Second Circuit properly held, such an argument was no longer tenable after this Court's decision in *College Savings*, which "expressly overruled" *Parden*. *Id.* *Burnette* thus presented an obvious example of a *Parden*-type waiver, which Congress sought to exact as the cost of participating in a regulated industry. Here, by contrast, the states are not the *regulated* actors, but rather are, if they choose

to be, the actual *regulators* under a new federal statutory scheme.

II. CONGRESS DID NOT VIOLATE THE TENTH AMENDMENT IN AUTHORIZING STATE OFFICIALS TO PERFORM DELEGATED FUNCTIONS AS VOLUNTARY DEPUTIZED FEDERAL REGULATORS.

The Tenth Amendment issue encompassed in petitioners' second question presented is not worthy of this Court's attention for several reasons.

A. To begin with, even if petitioners had a viable Tenth Amendment claim, this case would not be a suitable vehicle for examining that claim because neither of the courts below even addressed such a claim. Moreover, there is no circuit split on the question whether the scheme of cooperative federalism created by the Act comports with the Tenth Amendment. The only court of appeals to have addressed that question concluded that because state public utility commissioners "could have chosen not to participate" in the Act's regulatory scheme, "[t]he United States did not compel [the commissioners'] actions and, consequently, the Tenth Amendment does not bar Ameritech's suit." *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 868 (6th Cir.), cert. denied, 121 S. Ct. 54 (2000).

B. In addition, although petitioners purport to object to the federal regulatory scheme on Tenth Amendment grounds, their claim has nothing to do with that amendment. The Tenth Amendment forbids Congress from requiring states to legislate or execute laws on the federal government's behalf. In short, the states may interpose the Tenth Amendment to bar attempts by the federal government to either "requir[e] the States to address particular problems" or "command the States' officers * * * to administer or enforce a federal regulatory program." *Printz* v. *United States*, 521 U.S. 898, 935 (1997). But

petitioners are not seeking an order enjoining their participation in the federal regulatory tasks set forth in the Act. Indeed, petitioners *want* to perform these regulatory tasks. What they object to is federal court review of their actions as deputized federal regulators.

C. In any event, this Court's decisions establish that the Tenth Amendment does not bar the federal government from offering the states the choice of regulating according to federal standards and procedures or not regulating at all. As this Court has made clear time and again, "where Congress has the authority to regulate private activity under the Commerce Clause * * * [Congress may] offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York* v. *United States*, 505 U.S. 144, 167 (1992). See also *FERC* v. *Mississippi*, 456 U.S. 742, 761-71 (1982); *Hodel* v. *Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 288-89 (1981).

It is beyond question that Congress could preempt all state regulation of local telecommunications if it so chose. See *FERC*, 456 U.S. at 764 ("the commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities"). Although Congress did not go that far in the Act, "[w]ith regard to the matters addressed by the 1996 Act," it "has taken the regulation of local telecommunications competition away from the States." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). Yet within this "new federal regime," Congress has invited state commissions to participate as deputized federal regulators — subject to the procedural and substantive requirements of the Act, the foremost of which is that the states must regulate in accordance with the requirements of federal law and "must hew" to the "lines" that Congress and the FCC have drawn. *Id.*

As this Court has expressly noted, this type of arrangement "is replicated in numerous federal statutory schemes" that have been upheld as "permissible method[s] of encouraging a State to conform to federal policy choices." *New York*, 505 U.S. at 167-68 (citing *Hodel*, 452 U.S. at 289). As *FERC* and *Hodel* established, and this Court's subsequent decisions have reaffirmed, Congress may indirectly "'coerc[e] the States' into assuming a regulatory role by affecting their 'freedom to make decisions in areas of integral governmental functions'" (*FERC*, 456 U.S. at 766), but it may not "directly compel[] [the States] to enact and enforce a federal regulatory program." *Hodel*, 452 U.S. at 288; see also *FERC*, 456 U.S. at 766 ("it cannot be constitutionally determinative that the federal regulation is likely to move the States to act in a given way"). In short, as long as each state "retain[s] the ultimate decision" as to whether it will accept the benefit offered by Congress (*New York*, 505 U.S. at 168), a conditional benefit such as that offered under the Act passes Tenth Amendment muster.

III. THE COURTS OF APPEALS UNIFORMLY HAVE HELD THAT THE FEDERAL COURTS HAVE JURISDICTION TO REVIEW STATE COMMISSION DETERMINATIONS ENFORCING PREVIOUSLY-APPROVED SECTION 252 AGREEMENTS.

A. Petitioners next question the Seventh Circuit's decision that federal courts have jurisdiction under section 252(e)(6) of the Act to review state commission determinations concerning previously-approved section 252 interconnection agreements. However, the federal courts of appeals uniformly have held that (i) state commissions are authorized under the 1996 Act to interpret and enforce section 252 interconnection agreements, and (ii) decisions interpreting and enforcing those agreements constitute "determinations under section 252." See, *e.g.*, *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications*,

2000 WL 1827576, at *3 (10th Cir. Dec. 13, 2000) (holding that under section 252(e)(6) of the Act, "[t]he district court * * * had jurisdiction to review the OCC's decision interpreting and enforcing the federally mandated Interconnection Agreement"); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("the state commission's power to enforce a federally-mandated interconnection agreement arises from § 252, and thus a state commission's decision enforcing the agreement is a 'determination' under that section" that is reviewable in federal court under section 252(e)(6)); *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 479-80, 481 (5th Cir. 2000) (noting that "the Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved" and holding that "district courts have jurisdiction to review * * * interpretation and enforcement decisions of the state commissions"); *Illinois Bell Tel. Co.* v. *Worldcom Technologies, Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999) (noting that "subsection 252(e)(6) provides for judicial review of 'state commission actions,' not simply review of 'interconnection agreements'" and that "suits reviewing 'actions' by state commissions * * * were to be brought exclusively in the federal courts"), petitions for cert. filed, 69 U.S.L.W. ____ (Nov. 28, 2000) (No. 00-878) & 69 U.S.L.W. ____ (Nov. 28, 2000) (No. 00-921); Pet. App. 26a, 33a (holding that "[a] state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission" and that "Congress intended to provide for federal court review of any regulatory determination made under [section 252], whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its

place"). See also *Puerto Rico Tel. Co.* v. *Telecomms. Reg. Bd.*, 189 F.3d 1, 9-10 (1st Cir. 1999) (holding that a state commission action constitutes "a 'determination' under § 252" and thus "fall[s] within the jurisdictional bounds of § 252(e)(6)," if the aggrieved party's complaint alleges "a substantial nexus between the commission's determination and an interconnection agreement").[3]

In view of the unanimity in the federal courts of appeals on this question, there is no need for this Court to review petitioners' third question.[4]

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[3] The FCC has reached precisely the same conclusions as the courts of appeals. *Starpower* ¶¶ 6, 9 (holding that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" lies within "the states' 'responsibility' under section 252" and assuming jurisdiction over interpretation dispute subject to "judicial review of [its] findings" under section 252(e)(6)).

[4] To be sure, there is a vital and recurring dispute over whether federal courts have jurisdiction over a claim that a state commission determination concerning the rights and obligations of the parties to a section 252 interconnection agreement deviated from the plain terms of that agreement. Although one of the underlying claims in this case involves such a determination, the court of appeals had no occasion to reach the issue because the district court had dismissed the consolidated cases on Eleventh Amendment grounds. This important issue was squarely addressed, however, in *Illinois Bell*, 179 F.3d at 569-74, in which Ameritech has filed a petition for a writ of certiorari (No. 00-921) that remains pending. *Illinois Bell* is the appropriate vehicle for resolving that critical question that has divided the courts of appeals. Compare *Illinois Bell*, 179 F.3d at 573-74 (adopting bifurcated "allocation of authority," pursuant to which review of state commission determinations with respect to section 252 agreements encompassed in the same order is divided between federal and state courts) with *Brooks Fiber*, 2000 WL 1827576, at *4

IV. THE SEVENTH CIRCUIT'S HOLDING THAT THE PSCW COMMISSIONERS COULD BE SUED UNDER THE EX PARTE YOUNG DOCTRINE IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS.

A. Prior to the Seventh Circuit's decision in this case, two other federal courts of appeals had addressed the question whether an action seeking prospective relief against state officials, sued in their official capacities, for alleged violations of the federal Telecommunications Act of 1996 could be maintained under the *Ex parte Young* doctrine. In *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.), cert. denied, 121 S. Ct. 54 (2000), the Sixth Circuit answered that question in the affirmative, holding that such a suit "is a straightforward *Ex parte Young* case." As the Sixth Circuit explained, "[u]nder *Ex parte Young*, suits against state officials seeking equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment." *Id.* The court then noted that (i) the Commissioners approved and are responsible for ongoing enforcement of the interconnection agreement and (ii) Ameritech alleges that the obligations imposed by the agreement violate federal law and seeks equitable relief. *Id.* On this basis, the court concluded that "Ameritech has stated a claim against the Commissioners * * *

(rejecting *Illinois Bell* and adopting "more expansive view of federal jurisdiction" pursuant to which aggrieved party need not split claims between federal and state court); *Connect*, 225 F.3d at 947-48 (same); *Southwestern Bell*, 208 F.3d at 479-82 (same). See also *BellSouth Telecomms.* v. *MCIMetro Access Transmission Servs., Inc.*, 97 F. Supp. 2d 1363, 1376 n.10 (N.D. Ga. 2000) (noting the existence of a "circuit split concerning the scope of federal review" of challenges to state commission determinations "construing and enforcing" section 252 agreements).

for equitable relief from an ongoing violation of federal law," and "[u]nder *Ex parte Young*, Ameritech is entitled to proceed." *Id.* Subsequently, the Tenth Circuit reached precisely the same conclusion, expressly "adopt[ing] the Sixth Circuit's rationale and holding" that such an action is "'a straightforward *Ex parte Young* case.'" *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 939 (10th Cir. 2000) (quoting *Michigan Bell*, 202 F.3d at 867), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593). Accordingly, the only federal courts of appeals that have decided the question presented here are in full agreement with respect to the proper result and rationale.

B. The principal basis on which petitioners seek this Court's review is a purported conflict between the Seventh Circuit's decision and this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). As demonstrated below, the detailed remedial scheme that strictly limits the methods of judicial redress under the Indian Gaming Regulatory Act ("IGRA") in ways that are inconsistent with the judicial remedies available under *Ex parte Young* simply has no analog under the Telecommunications Act of 1996. The 1996 Act places no limitations at all on the remedies that a federal court may use in a section 252(e)(6) suit to ensure that the obligations imposed on incumbent LECs through interconnection agreements comport with the 1996 Act. *Ex parte Young* and the Act's judicial review provisions work together to effectuate Congress' manifest intent in the 1996 Act that state officials exercising federal regulatory power under the Act adhere to federal law. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

As this Court observed in *Seminole Tribe*, the IGRA imposes a duty on states to negotiate in good faith with Indian tribes concerning gaming on reservations, 25 U.S.C. § 2710(d)(3)(A), "in conjunction with" a very "carefully crafted and intricate remedial scheme" for limited enforcement of that

duty, *id.* § 2710(d)(7). *Seminole Tribe*, 517 U.S. at 73-74. For example, although IGRA authorizes a federal court to order a state to negotiate in good faith, 25 U.S.C. § 2710(d)(7)(B)(iii), the IGRA does not permit the court to enforce its own order with contempt sanctions, as it may do in normal circumstances. Instead, if a state flouts the court's order to negotiate, the court may only refer the matter to a mediator, who will consider proposed compacts submitted by the parties and choose the one that "best embodies the terms of the Act." *Id.* § 2710(d)(7)(B)(iv); see *Seminole Tribe*, 517 U.S. at 74. And, perhaps most important, under the IGRA a state will not be subject to judicial sanctions, such as contempt, even if it refuses to honor the compact selected by the mediator. In that event, "the only sanction * * * is that the mediator shall notify the Secretary of the Interior who then must prescribe regulations" governing gaming on the tribal lands at issue. *Seminole Tribe*, 517 U.S. at 74-75.

In addressing the Tribe's contention that jurisdiction over its suit was proper under the *Ex parte Young* doctrine, the Court in *Seminole Tribe* first expressly reaffirmed the vitality and importance of the *Ex parte Young* doctrine in "ensuring the States' compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14. As the Court explained, "an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Id.* And the Court stressed that *Ex parte Young* may be used to enforce state compliance with federal law *except* in the rare case in which (i) Congress has *specifically limited* the judicial remedies available against a state or its officials *and* (ii) those statutory limitations are *inconsistent* with the judicial remedies available against state officials under *Ex parte Young*. *Id.* at 71-72 & nn.14, 16. Applying this standard to the IGRA, the Court concluded that by confining the available remedies to a "quite modest set of sanctions," Congress had "strongly indicate[d] that [it] had no

wish to" permit the judicial remedies against state officials that would be available under *Ex parte Young*. *Id.* at 75-76.

Central to the holding in *Seminole Tribe*, therefore, was the fact that Congress placed express limits on the methods of judicial redress available to courts presented with a claim that a state had failed to comply with the IGRA. For that reason, allowing a party to use the federal courts to coerce a state into compliance with the IGRA through an injunction under *Ex parte Young*, backed by the threat of contempt in the event of disobedience, would have been inconsistent with the essentially non-coercive remedial scheme in the IGRA. But where Congress has not limited the available avenues of judicial redress, the post-*Seminole Tribe* decisions in the courts of appeals consistently have recognized the continuing applicability of the *Ex parte Young* doctrine. *E.g.*, *Ellis* v. *University of Kansas Med. Ctr.*, 163 F.3d 1186, 1198 (10th Cir. 1999) (allowing suit under *Ex parte Young* to proceed because 42 U.S.C. § 1981 contains "nothing that indicates a 'detailed remedial scheme' designed to limit or prevent potential remedies within the *Seminole Tribe* meaning"); *Marie O.* v. *Edgar*, 131 F.3d 610, 616 (7th Cir. 1997) (allowing suit under *Ex parte Young* to proceed because "[i]n contrast with *Seminole Tribe* * * * there is no explicit remedial scheme that provides only limited redress in federal court" for violation of Part H of the Individuals with Disabilities Education Act).

There is absolutely no tension, let alone inconsistency, between an *Ex parte Young* remedy and the Congressionally-prescribed remedy under the judicial review provisions in the 1996 Act. Unlike the situation in *Seminole Tribe*, permitting section 252(e)(6) suits to proceed under *Ex parte Young* would not "cast[] aside * * * limitations" that Congress intentionally created through "a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole Tribe*, 517 U.S. at 74. Contrary to petitioners'

contentions, there simply are *no* limitations in section 252(e)(6) on the remedies that a federal court may use to ensure that state officials performing federal regulatory functions under the Act comply with federal law. Section 252(e) simply instructs the federal court to review the state regulators' actions for compliance with the 1996 Act and, if those actions deviate from the Act, the court may fashion any appropriate relief needed to ensure that the officials "hew" to "the lines" drawn by the Act. *Cf. AT&T Corp.*, 525 U.S. at 378 n.6.

An *Ex parte Young* suit to ensure compliance with the 1996 Act is therefore fully consistent with the remedy that Congress prescribed. Indeed, it would be difficult to fashion a tighter fit between the remedy contemplated in the Act (a federal court order requiring that the agreement be modified to meet the requirements of the federal Act) and *Ex parte Young*'s core function of permitting "suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14 (citing *Ex parte Young*). In short, as one district court recently noted, "the remedy provided for by statute [under the Act] and the remedy under *Young* are one and the same." *Bell Atlantic-Delaware, Inc.* v. *Global Naps South, Inc.*, 77 F. Supp. 2d 492, 501 (D. Del. 1999).

C. Petitioners also appear to suggest that the Seventh Circuit's decision conflicts with *Ex parte Young* itself. Petitioners' contentions are way off the mark. It is petitioners, not the uniform decisions of the courts of appeals, that misapprehend the *Ex parte Young* doctrine.

1. Under *Ex parte Young* and its progeny, even where the state itself is immune from suit in federal court, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern* v. *Jordan*, 440 U.S. 332,

337 (1979). As many courts have observed, the doctrine is grounded in the Supremacy Clause and "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). In *Ex parte Young* itself, the Court held that a state official whose conduct violates federal law may not be said to represent the state, and thus is stripped of his or her immunity, because the state is bound to follow federal law under the Supremacy Clause. 209 U.S. 123, 159-60 (1908). The doctrine thus permits federal courts to issue declaratory or injunctive relief "to end a continuing violation of federal law" by state officials and "to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

This Court permitted actions to enjoin state officials acting in violation of federal law — which today might be called "*Ex parte Young* actions" in shorthand — long before *Ex parte Young* itself was decided. See *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 304-05 & n.14 (1952) (noting that the Court had "long held," prior to 1908, that injunctive actions against state officers could proceed consistent with the Eleventh Amendment and that *Ex parte Young*, merely "reexamined and reaffirmed" that principle); *Ex parte Young*, 209 U.S. at 167 (noting that "jurisdiction of this general character has * * * been exercised by Federal courts from the time of *Osborn* v. *Bank of United States*," a case decided in 1824). Indeed, federal courts have followed a longstanding practice of reviewing the actions of state public utility commissions pursuant to the rule of *Ex parte Young*. See, *e.g.*, *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 344 n.4 (1951). And this Court's recent decisions have reaffirmed the vitality of the *Young* doctrine.

Just last Term in *Alden* v. *Maine* the Court stated that "suits for declaratory or injunctive relief against state officers must * * * be permitted if [federal law] is to remain the supreme law of the land," and thus the *Ex parte Young* doctrine is an "essential * * * part of our sovereign immunity doctrine." 527 U.S. 706, 747-48 (1999); see also *id.* at 757.[5] Under this Court's decisions, to determine whether jurisdiction is available under *Ex parte Young*, federal courts need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment); see also *id.* at 298-99 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (endorsing the same two-part test). Ameritech's claims here easily meet this test, because Ameritech (i) alleges that the commissioners required the inclusion of certain provisions as part of an approved interconnection agreement

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[5] And two Terms earlier, all nine Justices reaffirmed "the continuing validity of the *Ex parte Young* doctrine." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997); see also *id.* at 281 ("[a]n allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke [*Ex parte Young*]"); *id.* at 293 (O'Connor, J., concurring in part and concurring in the judgment) ("When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar"); *id.* at 297 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) ("in the absence of some congressional limitation a federal court may entertain an individual's suit to enjoin a state officer from official action that violates federal law"). As Justice O'Connor stated, the *Ex parte Young* doctrine remains a "basic principle of federal law" that reflects "the importance of having federal courts open to enforce and interpret federal rights." *Id.* at 293 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment).

that imposes prospective, binding obligations on Ameritech and that the mandated inclusion and enforcement of those provisions and obligations is inconsistent with federal law and (ii) seeks equitable relief from those allegedly unlawful obligations. Pet. App. 16a-18a; see also *id.* at 48a.

2. Petitioners suggest that the Seventh Circuit's decision conflicts with *Ex parte Young* itself in several respects. This suggestion is plainly wrong.

First, petitioners assert that in permitting the respondents' lawsuits to go forward, the Seventh Circuit has violated the rule that "relief cannot be against the state when it is the true party in interest." Pet. 27. Petitioners' contention misreads this Court's precedents, which clearly hold that the State is *not* the real party in interest in a suit against a state official in his or her official capacity. Petitioners cite *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 101 (1984), but that case expressly noted that "a suit challenging the constitutionality of a state official's action is *not one against the State*. This was the holding in *Ex parte Young* * * *." *Pennhurst*, 465 U.S. at 102 (emphasis added). Since *Pennhurst*, this Court consistently has reaffirmed that "[i]n an injunctive or declaratory action grounded on federal law, the State's immunity can be overcome by naming state officials as defendants," and "official-capacity actions for prospective relief *are not treated as actions against the State.*" *Kentucky* v. *Graham*, 473 U.S. 159, 169 n.18, 167 n.14 (1985) (emphasis added). See also *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989); *Futernick* v. *Sumpter Twp.*, 78 F.3d 1051, 1055 (6th Cir. 1996) ("state officers who are violating a federal law may always be sued for purely injunctive relief — 'capacity' and 'party in interest' are irrelevant").

Second, petitioners contend that allowing respondents to proceed under *Ex parte Young* runs afoul of the requirement

that "relief must be prospective in nature to address an ongoing violation." Pet. 27. Petitioners' suggestion that their orders have no "ongoing" effects and, at most, constitute past violations of federal law is simply wrong. Under section 252, if the parties cannot agree on what terms and conditions are required by the Act, state public utility commissioners step in as *regulators* and "impos[e] appropriate conditions as required to implement" the federal Act. 47 U.S.C. §§ 252(b)(4)(C) and 252(c)(1). The state officials then require the parties to put those obligations into an interconnection agreement prior to seeking final approval. 47 U.S.C. § 252(e)(1). In performing these functions, petitioners exercised *coercive regulatory power*, and what resulted from their exercise of that power was a carrier-specific government regulation that is legally binding on the parties unless and until it is set aside by a federal court pursuant to section 252(e)(6).

Moreover, the "ongoing" legal consequences of the Commissioners' orders are not confined to the parties to the agreement. Under section 252(i) of the Act, the terms and conditions that the Commissioners imposed on Ameritech in the Climax agreement are available to any other carrier that requests them. Under these circumstances, it is simply undeniable that the interconnection orders that Ameritech is challenging here have "ongoing" legal consequences. Indeed, it is well established that an official capacity action against a state official may proceed under *Ex parte Young* even if the violation arises from past conduct, provided that the unlawful effects are ongoing and the relief sought acts prospectively. *Papasan* v. *Allain*, 478 U.S. 265, 282 (1986) (*Ex parte Young* action available to correct unlawful disparity in school funding resulting from past disposition of public lands). As the Fourth Circuit recently explained, "a future injunction is not made retrospective merely because it recognizes that an ongoing violation of law is the result of a past wrong." *CSX Transp.*,

Inc. v. *Board of Pub. Works*, 138 F.3d 537, 541 (4th Cir. 1998) (upholding an injunction against future collection of illegal taxes, even those that already had been assessed, as prospective relief under *Ex parte Young*).

Third, petitioners suggest that an *Ex parte Young* action would improperly interfere with the exercise of state agency discretion relating to the arbitration and approval or rejection of interconnection agreements. Pet. 29-30. Contrary to petitioners' suggestion, they *do* have a duty to comply with the numerous substantive and procedural requirements imposed by federal law. *Alden* v. *Maine*, 527 U.S. 706, 755 (1999) ("The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design"). Once petitioners opted to participate in the arbitration and approval process under the Act, they were duty bound to ensure that the interconnection agreement they imposed on Ameritech comported with federal law. Simply put, under the Supremacy Clause, petitioners have no discretion to violate federal law when discharging their duties under the Act. As this Court held in *Ex parte Young* itself, state officials' "general discretion regarding the enforcement of the laws * * * is not interfered with by an injunction which restrains the state officer from taking any steps toward the enforcement of an unconstitutional enactment, to the injury of the complainant." *Ex parte Young*, 209 U.S. at 159. As the Court explained, "[a]n injunction to prevent [a state official] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Id.*; see also *Poindexter* v. *Greenhow*, 114 U.S. 270, 290 (1885) ("the distinction between the government of a state and the state itself is important, and should be observed"); *id.* ("whatever wrong is attempted in [the] name [of the state] is imputable to its government, and not to the state, for, as [the state] can speak and act only by law, whatever it does say and do must be lawful"). Where, as here, a complaint properly

alleges that state officials have committed ongoing violations of federal law, petitioners' reliance on the concept of discretion is misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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